BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LOUIS MORGAN	)	
Claimant	)	
	)	
VS.	)	
	)	
KRAUSE CORPORATION	)	
Respondent	)	Docket No. 1,053,077
	)	
AND	)	
	)	
CINCINNATI INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the January 6, 2011 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore (ALJ).

ISSUES

The ALJ denied claimant's preliminary hearing requests after finding that claimant failed to sustain his burden of proof of personal injury arising out of and in the course of his employment with respondent, failed to provide notice of an accident with 10 days and failed to provide "just cause" for enlargement of the notice period to 75 days.[1]

The claimant requests review of whether the ALJ erred in his determination that he failed to sustain his burden of proof of personal injury arising out of and in the course of his employment with respondent and failed to provide notice of an accident. Claimant has not filed a brief to further support these issues but presumably would argue that the evidence offered at the preliminary hearing does, in fact, support his claims and the ALJ's Order should be reversed.

[1] These findings were made based solely upon an alleged accident date of August 19, 2010. At the preliminary hearing, the ALJ specifically found that claimant did not sustain a series of accident and therefore did not make any further findings with respect to notice of a series of injuries. P.H. Trans. at 117.

Respondent argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant alleges a work-related injury to his low back which he contends occurred first on August 19, 2010, and a series of injuries to the same area each and every day thereafter. The existence of this acute accident, as well as a series, is in dispute and necessitated a preliminary hearing.

Claimant testified that he was working on August 19, 2010 lifting boxes of bolts from a fork lift, twisting to put the boxes away when he felt a "pop" at his waist. He stretched his back out and rested for about 5 minutes, then resumed working. According to claimant, he was chatting with a co-worker, Danny Mathis, approximately 1-1/2 hours later when he encountered his Lead Man, Mike Tafola. Claimant testified that he told Tafola that he had hurt his back but said nothing more.[2]

Claimant continued working that day and the rest of his regularly scheduled days although he says he continued to have pain and often needed to take a hot shower at the end of the day to relieve his symptoms. He also continued his hobby of racing cars, engaging in races on Friday nights through August and up to and including September 3, 2010.

Claimant testified that on Tuesday, September 7, 2010, he reported to work and his co-worker, Dan Mathis, was gone that day, thus leaving claimant alone in the area and requiring him to perform more duties than normal. Then, on Wednesday, September 8, 2010, claimant woke up and found he had difficulty standing and some numbness in his left leg. Claimant apparently called in to work and told his employer he would not be in that morning.[3] He says he sought treatment from Dr. F.J. Farmer, who asked him if his complaints were work-related. Claimant indicated he did not know.[4] Tests were ordered and claimant was placed on light duty.

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[2] P.H. Trans. at 15-16.

[3] This testimony comes from Quint Martens who says he received a voicemail message from claimant early in the morning on 9/8/10. Claimant did not say he was suffering from back pain nor made any reference to why he would not be in.

[4] P.H. Trans. at 18.

Claimant contacted his employer and told them of the light duty restrictions. He also testified that he told "Talena" that this was work-related.[5] At another point in the record, when asked if he told "Talena" this was work-related, claimant said "I'm going to say I think I did."[6] Claimant says no light duty was available and as a result, September 7, 2010 was his last date of work. Up until this point, claimant had not asked to fill out any sort of accident report testifying that "he just didn't think about it."[7] Later on at the preliminary hearing, claimant testified that he did not know he was to fill out such a claim.[8] On September 22, 2010, claimant completed an accident report and provided the particulars of his accident. This accident report indicates a single acute accident on August 19, 2010.

Dr. Farmer's records from September 8, 2010 reflect claimant's low back complaints and radiating numbness down the left leg *dating back one month*. There is no mention of a work-related injury within these records. Claimant says that question was specifically asked of him and while he knew he'd been injured at work, he did not want to make a false claim for workers compensation benefits.[9]

Claimant also went to see Dr. Lee Dorey, at his attorney's request. Dr. Dorey concluded claimant sustained an injury to his L5-S1 disk as a result of his August 19, 2010 injury. He further concludes that injury worsened over time as claimant continued to work and culminated in the event on September 8, 2010, when claimant could barely get out of bed. As both the respondent and the ALJ noted, Dr. Dorey wasn't told of claimant's previous history (dating back to 2008) of low back complaints with radiating pain into the left leg. Thus, his conclusion that claimant's present complaints were solely attributable to the events claimant describes were compromised.

Not only did claimant testify at this preliminary hearing, but respondent offered the live testimony of Mike Tafola, Dan Mathis, Quint Martens and Michael Evans. Mr. Tafola and Mr. Mathis confirm that they saw and/or spoke to claimant on a daily basis but both deny any specific knowledge of an injury on August 19, 2010, or of any complaints or notification from claimant about an injury or ongoing complaints. Mike Tafola confirms that he spoke with claimant on August 19, 2010 and asked, generically, how things were going but says claimant never told him of an injury nor made complaints about his back. Mr.

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[5] It appears from the record that Talena is someone who addresses workers compensation issues within respondent's company.

[6] P.H. Trans. at 44.

[7] *Id.* at 23.

[8] *Id.* at 51.

[9] *Id.* at 18.

Tafola testified that if he is told about an injury, he would not let it pass. He would make an inquiry and get it taken care of.[10]

Dan Mathis testified that claimant never told him of an injury nor complained specifically back problems, although he indicated that when claimant first started his job with respondent, claimant complained about a number of issues, such as being tired, couldn't breathe, and problems lifting.[11] When asked about claimant's overall credibility, Mr. Mathis testified that "the word BS comes to mind."[12] Mr. Mathis also testified that sometime before claimant's last day of work, claimant was written up for a work issue and after that write up, claimant mentioned to Mr. Mathis that he feared he would be fired.

Another co-worker of claimant's, Michael Evans, testified that he saw claimant racing cars on each of the Fridays between August 29 and September 8, 2010. At one of those races, claimant and another driver crashed. The crash was significant enough that both cars were towed from the race. The record is somewhat ambiguous as to precisely when this wreck occurred, either August 13, 2010 or September 3, 2010, but in either event, it was before September 8, 2010. And in no event do any of the physician's records reveal the fact that claimant was in such a wreck.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[13]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[14]

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[10] *Id.* at 67.

[11] *Id.* at 69.

[12] *Id.* at 80.

[13] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[14] K.S.A. 2009 Supp. 44-501(a).

Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[15]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[16]

In addition to the requirements above, a claimant must provide his employer with sufficient and timely notice of his injury. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

In the case of acute injuries, calculating the timeliness of a claimant's notice is straightforward. However, in the case of repetitive injuries, the timeliness of a claimant's

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[15] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

[16] *Id.*

notice necessarily requires a determination of the "date of accident" a legal fiction that is addressed by K.S.A. 44-508(d).

The ALJ concluded first, that he did not believe that claimant sustained a series of accidents while in respondent's employ. Thus, the provisions of K.S.A. 44-508(d) were not, in his view, involved nor discussed in his Order. And claimant has provided no written brief which would expand on his argument (at the preliminary hearing) that K.S.A. 44-508(d) might apply.

Independent of that finding, he went on to conclude that claimant failed to meet his burden of establishing personal injury by accident arising out of and in the course of his employment with respondent. Finally, he concluded and found that claimant failed to provide appropriate notice of his accident with 10 days and likewise failed to establish just cause to enlarge that time to 75 days.[17]

This Board Member has carefully reviewed the entire record in this matter, as presently developed, and concludes the ALJ's findings of fact are accurate and his conclusions as to the claimant's failure to meet his evidentiary burdens should be sustained.

As the ALJ explained on the record at the preliminary hearing, claimant's credibility is lacking. He has, by his own admission, suffered from low back pain and numbness into his left leg for 2 years, although this fact was not disclosed to the physicians who he called upon to treat him for this alleged work-related injury. He testified that he told his employer of his back injury, but they deny such notification. And when asked if he told respondent of the work-related nature of his complaints, he at one time definitively says he did while in another, says "I'm going to say I think I did." He also testified that he clearly knew he hurt himself at work and yet when he sought medical treatment, he seems to hedge his testimony and says he didn't want to make a false claim to the doctor.

Complicating all of this is the fact that claimant is a volunteer EMT and well knows the importance of taking *and giving* an accurate history when treating individuals who are injured.[18] And based upon the testimony of Michael Evans, claimant appears to have been in some sort of motor vehicle wreck shortly before September 8, 2010, a fact that was not disclosed to any of the physicians. Finally, claimant was disciplined shortly before September 8, 2010 and apparently told his co-worker of his impending termination, thus giving some fuel to the idea that claimant's injury is something other than what he describes.

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[17] ALJ Order (Jan. 6, 2011).

[18] P.H. Trans. at 52.

Like the ALJ, this Board Member is not persuaded that claimant sustained an accident on August 19, 2010 arising out of or in the course of his employment with respondent, nor a series of accidents[19], that he did not give timely notice of his alleged August 19, 2010 accident, and that claimant failed to establish just cause to enlarge the statutory time period prescribed for notice.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[20] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated January 6, 2011, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March 2011.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

[19] By concluding that claimant failed to establish he sustained a series of injuries, the implications of K.S.A. 44-508(d) are not involved and need not be discussed.

[20] K.S.A. 44-534a.